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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KICKN BACK PROPERTIES, LLC, Plaintiff and Appellant, v. ZUOZ COMPANY, LLC, et al., Defendants and Respondents.	G055610 (Super. Ct. No. 30-2017-00930089) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Law Offices of Michael Leight and Michael Leight for Plaintiff and Appellant.

Strong & Hanni and Chet W. Neilson for Defendants and Respondents.

INTRODUCTION

Kickn Back Properties, LLC, appeals from an order dismissing its complaint for breach of two promissory notes. The trial court entered a judgment dismissing the complaint because both notes contained forum selection clauses designating Utah as the exclusive forum for enforcement.

We affirm. Kickn Back failed to carry its heavy burden of showing why the forum selection clauses in these ordinary commercial notes were not enforceable. It failed to show any unwaivable statutory rights that would be compromised by conducting this litigation in Utah or any reason that Utah was unsuitable or unavailable as a forum for resolving this dispute.

FACTS

Kickn Back sued respondents Zuoz Company, LLC, John and Sara Tyler (the Tylers) individually, and the Tyler Family Trust for breaching two promissory notes, one dated July 5, 2012, for $70,000 and the other dated April 1, 2013, for $15,000. The borrowers were the Tylers, their trust, and Zuoz. The notes were signed by the Tylers individually, as trustees of the trust, and as managers of Zuoz. Both notes were amended twice. The first amendments, dated June 2013, suspended certain payments and extended the maturity date to October 2022 for the first note and to July 2016 for the second note. Only Zuoz signed these amendments. The second amendments, dated January and February 2014, suspended certain payments and extended the maturity date to January 2023 for the first note and to October 2016 for the second note. The second amendments were signed by the Tylers as managers of Zuoz and by Kickn Back.

Both original promissory notes included identical forum selection clauses: "Any action to enforce this Note shall be brought within the State of Utah." None of the amendments mentioned the clauses. The first amendments each included a provision that the original notes were otherwise unchanged.

The Tylers and Zuoz moved to dismiss the complaint, basing the motion on the forum selection clause in each note. They maintained that any suit to enforce the notes had to be brought in Utah.

The moving papers did not include a declaration by a party or an attorney. Instead, the memorandum of point and authorities included statements about the Tylers and about Zuoz, a Nevada limited liability company. These statements included connections between Zuoz and Utah and the Tylers' part-time residence in Utah.

Kickn Back opposed the motion to dismiss. The declarant for Kickn Back asserted that the notes were prepared after the money had already changed hands, without any negotiation. The declarant also made other statements about the Tylers and their connection to both California and Utah, maintaining in essence that their only connection with Utah was that they rented a condo there during the summer months. Respondents attempted to submit additional facts regarding the Tylers, Zuoz, and Utah by means of a declaration in the reply to Kickn Back's opposition, but the trial court did not consider additional facts submitted with the reply.

The trial court granted the motion to dismiss.[1] Although the debt did not have to be memorialized in writing in order for Kickn Back to sue to collect it, Kickn Back had chosen to sue on written obligations. It had attached copies of the notes as exhibits to the complaint, without objecting to any of their terms. The court also pointed out that both notes had been amended twice. Kickn Back had not objected to the forum selection clause at either time and had signed the second amendments, again without indicating any objection to the clause. The court held that Kickn Back could not pick and choose among contract terms it wanted to enforce. If it sued for breach of a written contract, it had to take the contract as a whole.

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[1] The court held a hearing on September 18, 2017, for which we have a transcript. Evidently it held another hearing on September 25, for which we do not have a transcript. The court took the matter under submission on September 25 and issued its order on October 6.

The minute order dismissing the case was filed on October 6, 2017. Kickn Back filed its notice of appeal on October 23, 2017. The order dismissing the case was entered on December 1, 2017.

DISCUSSION

A judgment dismissing a case on forum non conveniens grounds is appealable.[2] (*City of Los Angeles v. City of Los Angeles Employee Relations Bd.* (2016) 7 Cal.App.5th 150, 157; *Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358 [motion based on forum selection clause type of forum non conveniens motion]; Code Civ. Proc., § 904.1, subd. (a)(3).) In accordance with the majority view, we review a judgment of dismissal based on a forum selection clause for abuse of discretion. (*Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 148 (*Verdugo*).) The appellant must show abuse of discretion to prevail. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443 (*Howard*).) As a reviewing court, we must presume that the trial court's decision is correct, even as to matters on which the record is silent. (*Howard, supra,* 10 Cal.4th at p. 443.)

An enforceable forum selection clause specifies a forum that is "'suitable,' 'available,' and able to 'accomplish substantial justice.'" (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 12, quoting *The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 17 (*The Bremen*).) Usually, the party opposing enforcement of a forum selection clause bears the "substantial burden" of showing why it should not be enforced. (*CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1354 (*CQL*).) The burden is reversed, however, "when the claims at issue are based on unwaivable rights created by California statutes." (*Verdugo, supra,* 237 Cal.App.4th at p. 147.)

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[2] Kickn Back's notice of appeal, filed after the minute order was entered but before entry of judgment, was premature. Under California Rules of Court, rule 8.104(d)(1), the notice of appeal is considered timely.

In this case, we must assume that the trial court found that this ordinary commercial transaction encompassed no unwaivable statutory rights and Utah was a suitable and available forum, able to accomplish substantial justice. Likewise, Kickn Back has not shown that litigating in Utah will be so gravely difficult that it would, for all practical purposes, be deprived of its day in court. (See *The Bremen, supra,* 407 U.S. at p. 19.)

The trial court specifically found that Kickn Back had affirmed the terms of the written promissory notes, including the forum selection clauses, by basing its causes of action on them. "A party who sues for breach of contract thereby affirms the contract's existence, and the damages awarded 'compensate[] the party not in default for the loss of his "expectational interest" – the benefit of his bargain which full performance would have brought.' [Citation.]" (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1144-1145; see also *Rischard v. Miller* (1920) 182 Cal. 351, 354 [plaintiff affirms contract by suing to enforce it.])[3]

Kickn Back's opening brief does not address the affirmation issue, which was the basis of the court's ruling. Instead, Kickn Back argues that the forum selection clause is not enforceable because there is no "logical connection with at least one of the parties or their transaction" (*Verdugo, supra,* 237 Cal.App.4th at p. 147) and Utah. It would therefore be "unreasonable" to enforce the clause. (See *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496 (*Smith*).) As evidence of this lack of "logical connection" with Utah, Kickn Back listed the Tylers' multiple contacts with *California*. In essence, Kickn Back argues that the Tylers have many contacts with California; therefore, they have no logical connection with Utah. This is a non sequitur.

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[3] Both promissory notes include attorney fee provisions, which Kickn Back seeks to enforce by means of its complaint. The notes impose joint and several liability on the borrowers, which Kickn Back also seeks to enforce.

Moreover, Kickn Back's own declaration established a "logical connection" with Utah – the Tylers' customary part-time residence in the state – for one of the parties to the transaction. Kickn Back reinforced this connection in its opening brief: "The 2012 Note was signed by the Tylers when they were on vacation in Utah." (See *Moore v. Powell* (1977) 70 Cal.App.3d 583, 586, fn. 2 ["A factual statement in a brief may be treated as an admission or stipulation when adverse to the party making it."]) This is evidence that the Tylers did not pull Utah's name out of a hat as the forum for resolving disputes about the promissory notes. (See *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1682 (*Cal-State*) [choice of forum "reasonable" even if unrelated to domiciles or transactions involved].) If Kickn Back's complaint is that this is *insufficient* to establish a "logical connection," the trial court decided otherwise, and we are hard pressed to contradict it.

Kickn Back's second argument against enforcement is that a party must have "freely and voluntarily" "negotiated at arms' length" in order for a clause to be enforceable. Kickn Back argues that the forum selection clause was not negotiated at all; it was included in the notes after the transaction was complete. As stated in the opening brief, "[Kickn Back] never entered into the forum selection clause freely, voluntarily, knowingly, or at all."

The second argument is based on language from *Smith, supra,* the case in which the California Supreme Court approved of enforcing forum selection clauses under state law, following the United States Supreme Court's ruling in favor of these clauses in *The Bremen*. (*Smith, supra,* 17 Cal.3d at p. 495.) As the court stated, "No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length." (*Id.* at pp. 495-496.)

The *Smith* court did not hold that the forum selection clause must be individually negotiated. It is the entire contract that has been entered into freely and

voluntarily after being negotiated at arms' length. In fact, subsequent cases have held forum selection clauses enforceable in contracts that have *not* been "negotiated at arms' length" – i.e., adhesion contracts – so long as the weaker party has adequate notice of the clause. (See *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 201-202 (*Intershop*); *Cal-State, supra,* 12 Cal.App.4th at p. 1681.) This is true even when, as it appears here, a party had not read the contract. (*Intershop, supra,* 104 Cal.App.4th at p. 202.)

In this case, Kickn Back presented no evidence that its agreement to lend money to respondents was not free and voluntary or that it could not have refused to lend to Zuoz and the Tylers. The argument that the notes were not negotiated at all but were presented to Kickn Back after the fact ignores subsequent events. Kickn Back twice had the opportunity to object to the clause, when the notes were amended, and twice failed to do so. The first amendment explicitly stated, "This is the only amendment to the original NOTE and no other amendments or modifications of the original note have been made." The second amendment acknowledged the first amendment and was signed by Kickn Back. While the clauses may have originally been included in the notes after the fact, they were conspicuous, and Kickn Back had ample opportunity to object to and renegotiate them before it sued on the notes.

The evidence Kickn Back presented did not address the main issue the motion placed before the trial court– the suitability of Utah as a forum. Instead, Kickn Back presented facts about the Tylers' connection to *California*, which would be relevant if the issue were jurisdiction based on minimum contacts or on Utah's long-arm statute. (Utah Code Ann., § 78B-3-205; see *Cal-State, supra,* 12 Cal.App.4th at p. 1683.) The issue before the court, however, was not whether California was a suitable or available forum, but rather whether Utah was unsuitable, unavailable, or so burdensome as a forum that Kickn Back would be deprived of its day in court. Kickn Back presented no evidence at all on these subjects. (See *CQL, supra,* 39 Cal.App.4th at p. 1358.)

DISPOSITION

The judgment of dismissal is affirmed. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.